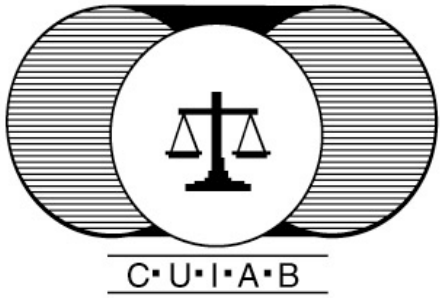

TWENTY-SEVEN WAYS TO AVOID LOSING YOUR UNEMPLOYMENT APPEAL

By William DeMartini

Chief Administrative Law Judge (11/79 - 9/82)

California Unemployment Insurance Appeals Board

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The unemployment appeal process is simple and tailored for claimants and employers who do not have an attorney. At an informal hearing the ALJ advises all parties of their rights and conducts most of the questioning of witnesses. Most of the technical rules restricting the admission of evidence encountered in a courtroom do not apply in unemployment hearings.

In other words, there are no technical traps. There are, however, a number of ways to hamper your own efforts and increase your chances of losing. The following material deals with avoiding the most common pitfalls.

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1. FILE YOUR APPEAL ON TIME.

An appeal to an ALJ must be filed within 20 days of the mailing date of the Department determination or ruling (Section 1328, California Unemployment Insurance Code). The mailing date is on the notice of determination or ruling.

Good Cause for Late Appeals

If you file your appeal AFTER the deadline, you must have good cause for failing to file within the time limit. Good cause generally means you were prevented from making the deadline by circumstances beyond your control and which could not have been reasonably anticipated. Excuses such as: you forgot or you did not note the deadline on the Department document do not constitute legal good cause.

The Department notice of determination or ruling sent to an employer is considered properly served if it was received at any business address of the company. Claimants often report the address at which they worked, rather than company headquarters, on unemployment insurance forms. In such a case, the Department may send its notice of determination or ruling to that address. Therefore, the fact the Department determination did not arrive on the desk of a personnel officer or other company official in time to file an appeal within the deadline does not constitute good cause. It is the company's responsibility to route the Department document to the proper person on time. The same rule, generally speaking, applies to union representatives and lawyers authorized to file claimants' appeals. It is the claimant's responsibility to arrange with his or her representative to have the appeal filed on time.

How to Appeal

The law requires that the appeal be in writing and that it be filed with the Office of Appeals or EDD office where the case is located on or before the 20th day of the mailing date of the Department determination or ruling. You may use an appeal form obtainable from any EDD or Appeals Board office, but it is not necessary to use this form. You may simply write a letter which must include the following: the appellant's name and mailing address; the employer account number, if any, of the appellant; the name and mailing address of any representative filing the appeal; and the name and social security number of any claimant who is a party. The appeal may also include the appellant's telephone number and/or electronic address; the date or case number of the department action that is being appealed; a concise statement of the reasons for the appeal; any request for language assistance or special accommodation; and the appellant's signature and the date signed. (Sections 5000 (gg) and 5008, Title 22, California Code of Regulations)

2. IF YOUR APPEAL WAS FILED LATE, BE PREPARED TO STATE THE REASONS.

Section 5051, Title 22, California Code of Regulations, provides a late appeal will be dismissed if the appellant fails to establish good cause for the delay.

Appellants occasionally defeat their own appeal by sending a representative to the hearing who is prepared to present evidence on the main issues of the case but knows nothing about the cause of the late filing of the appeal.

3. PREPARE YOUR CASE BEFORE THE HEARING.

Recollections rapidly fade, witnesses move, documents are discarded. In other Words: evidence grows quickly stale.

As soon as possible after you file an appeal, or learn that the other party has filed one, interview witnesses, review the necessary documents and records, and begin to gather the essential evidence necessary to present your appeal.

A good place to start is the Department's case file. You may arrange to review this file by contacting the Office of Appeals to which the hearing has been assigned. The Department case file should reveal the information gathered by Department representatives in making the determination being appealed. Once you review this material you should have an idea what you will need to challenge or support, as the case may be, the Department's conclusions.

Your preparation for the hearing need not necessarily be elaborate. You may need only to produce one witness or to secure one document. As is often the case, you may need only your own testimony on a point the Department representatives did not consider or were unaware of.

4. BE PREPARED ON ALL THE ISSUES.

Parties to appeals, particularly claimants, often focus their attention only on the separation (discharge or voluntary quit) issue and overlook such additional issues as: alleged false statements, overpayments, availability or claim filing requirements.

Check all Department documents, and if in doubt, contact a Department representative to make sure you are aware of all the issues of eligibility raised by Department determinations.

5. IF THE OTHER SIDE FILED THE APPEAL, PREPARE YOUR CASE ANYWAY.

Your opponent has given a statement to the Department and the Department has issued a determination favorable to you. What more, you ask yourself, can the other side say? You may be astonished to hear what the other side has to say when they get before an ALJ. If you approach preparation of the case as if it were your own appeal, you will be better prepared to meet whatever contentions the other side raises.

Needless to say, if it is not advisable for the respondent (the party who did not appeal) to appear at the hearing unprepared, it is doubly perilous not to appear at the hearing at all.

6. ANALYZE THE CASE.

Parties to appeals often misconceive the issues. For some unknown reason, the claimant who has been disqualified for quitting without good cause spends time and energy producing such things as favorable performance reports to prove he or she was a good worker or, in a case of a discharge for alleged misconduct, comes to the hearing with a long list of complaints about the employing company and job conditions.

Similarly, employers often go to great lengths to prove the employee who allegedly quit without good cause was an undesirable worker anyway.

A common mistake is preparing only to smear the good name of your opponent. Vilifying the other side may be a form of catharsis but if you wish to win the appeal you should concentrate your efforts on the legal issues which control eligibility. If you are in doubt, read the explanation of the issues of eligibility set forth in the Department determination and/or ruling and the brief explanation of the issues on your hearing notice.

7. TAKE NOTICE OF THE NOTICE OF HEARING.

The notice of hearing, which should be examined carefully as soon as you receive it, sets out two vital pieces of information:

a. The time, date, and place of hearing.

b. The issues to be covered in the hearing.

It would seem unnecessary to explain the significance of item a. Parties to appeals, however, have shown up at traffic court, an EDD job placement office, City Hall--almost anywhere except the place spelled out on their hearing notices--and as much as one month late for the hearing.

It is a good idea to retain, and bring to the hearing, your copy of the notice. Mistakes seldom occur but they have been made. If the ALJ's calendar and/or copy of the notice in the appeal file shows a different time or date, your copy is the best proof the mistake is not yours.

Note item b. carefully so that you are prepared on all the issues to be taken up at the hearing. Parties occasionally overlook or forget the fact that there may be more than one issue of eligibility at stake, particularly when two or more Department determinations or notices of overpayments are combined in one hearing. If the notice of hearing does not list issues you expect to be covered at the hearing, contact the Office of Appeals as soon as possible.

8. IF YOU HAVE A PROBLEM WITH THE DATE OF THE HEARING, PROMPTLY REQUEST A NEW DATE.

Section 5057, Title 22, California code of Regulations, states, in part:

An administrative law judge may continue a hearing to another time or place on his or her own motion or, upon a showing of good cause, on the application of a party. The unavailability of a party of witness to be physically present at a hearing is presumed not to be good cause for a continuance, unless the party or witness is also unavailable to participate in the hearing by electronic means.

9. SUBPOENA WITNESSES WHOSE ATTENDANCE YOU CANNOT CONTROL.

Due process of law requires only that you be given one reasonable opportunity to present your evidence. The fact that you believed the missing witness would voluntarily appear is a feeble excuse which, in most cases, does not entitle you to a second chance.

The Office of Appeals to which your appeal is assigned will, at your request, either: issue a Subpoena, or mail out a Notice to Attend.

The Subpoena will be given to you (or your representative). You must arrange to have it personally served on the witness.

The Notice to Attend is mailed to the witness. The Office of Appeals does the mailing.

You must supply the witness's name, and for a Notice to Attend, the witness's address.

If you do not know which is best in your case, a Subpoena or a Notice to Attend, contact the Office of Appeals (the telephone number is on your hearing notice).

10. MAKE AN EARLY REQUEST FOR SUBPOENAS OR NOTICES TO ATTEND.

Witnesses are entitled to reasonable advance notice that their attendance at the hearing is required. You must make allowance for mailing time if you request notices to attend and/or provide adequate time for service of subpoenas. If your witness is subpoenaed, or served with a notice to attend, at the last possible minute, you run the risk of the Subpoena or Notice to Attend being unenforceable.

11. DO NOT SUBPOENA WITNESS(ES) AGAINST YOU.

Parties sometimes seek subpoenas, or notices to attend, addressed to adverse witnesses.

You have no obligation to produce evidence adverse to you. There is always the chance the other party will not produce that witness. In most cases, there is no reason why you should not permit that possibility to work in your favor.

12. DISCUSS YOUR WITNESS' TESTIMONY BEFORE THE HEARING.

There is nothing improper about reviewing witness' testimony prior to the hearing. This is not to suggest that you would coach or attempt to induce your witness to give false testimony. Witnesses, however, often innocently create the wrong impression, or, failing to understand the issues on appeal, go off on a tangent.

It is also possible that after discussing the witness' knowledge of the events in question, you may decide you do not want that person to testify. This decision is better made before the hearing than in the middle of the witness' testimony.

13. SHOW UP ON TIME.

Section 5066, Title 22, California Code of Regulations, provides that the ALJ may dismiss the appeal if the appellant fails to appear in the hearing. If it is your appeal and you do not appear at the appointed hour, and the ALJ received no other communication from you, the ALJ has no way of knowing whether you will appear at all. It is only fair and reasonable that the ALJ will then allow the other party and witnesses to leave. Even if you show up later, the hearing cannot be held if the other side is not present.

The law provides no leeway. On time is on time. ALJs customarily wait 15 minutes for the appellant before sending the other side home and dismissing the appeal. You have no legal right, however, to the 15 minutes' grace. If you are not the appellant the hearing will proceed, on schedule, without you.

The printed hearing notice form instructs you to arrive 10 minutes early. It is a good idea to do so, if for no other reason than to make a last minute check of the documents

and records in the appeals file to see whether something new has been filed since you reviewed the contents of that folder.

If you have a last minute emergency or delay en route to the hearing, contact the Office of Appeals immediately.

14. WHEN IN DOUBT, PRESENT TESTIMONY.

You need not attend the hearing in person and may submit your evidence in the form of written declaration and attached document(s).

This may be a satisfactory method of proof in certain cases, such as where the only evidence necessary is a physician's certificate. In any case where there is a dispute over what was said or done, however, the decision not to present live testimony should not be lightly made. Written statements are not entitled to the same evidentiary weight, principally because a document cannot be cross-examined.

Personal attendance by a party, however, is not always essential. The employer who has no direct knowledge of the case is better off sending only the foreman who can give firsthand testimony than to appear only for the purpose of presenting the foreman's written statement.

15. PRESENT THE EYEWITNESS.

The best form of evidence to an event is the testimony of an eye witness. Still, employers often make the fundamental mistake of sending only a personnel official who has no firsthand knowledge of key events and claimants choose to bring a friend who can testify to nothing relevant.

If you had a photograph taken at the instant the disputed action took place, you would present the photo. You would not dream of submitting only a secondhand description of what the photo depicted. Nevertheless, failing to produce the witness with the most firsthand knowledge is among the most common mistakes made by both parties. It can be a double- edged trap. Not only do you deprive yourself of the best evidence on your behalf but the law provides that less weight should be given to the evidence offered when it is within the power of the party to produce stronger or more satisfactory evidence (California Evidence Code Section 412).

16. PRESENT THE KEY DOCUMENT.

This is a corollary to bringing the key witness. The so-called best evidence rule is well named. The best evidence of the contents of a document is the document itself. If you do not have possession of the key document, contact the Office of Appeals and arrange to have this document subpoenaed.

Do not hesitate to bring the original copy of the document to the hearing. Unless special circumstances require that the original be kept in the appeal file, the ALJ will make a copy for the appeals file and return the original to you at the conclusion of the hearing.

17. SUMMARIZE VOLUMINOUS WRITTEN MATERIAL.

Submitting documents in evidence can be overdone. Occasionally parties produce a bewildering stack of written material, such as personnel records, or time cards or sheets. You have a right to offer all the documents and records you see fit. But if you

produce a haystack, it is wise to help the ALJ find the needle. Prepare a simple chart or written summary setting forth key information such as: the dates the claimant was late; how late on each occasion; and the excuses given.

ALJs review all evidence carefully, but company records can be confusing and abbreviations or symbols ambiguous. If you have failed to summarize this material and/or to point out key items in lengthy documents, you run the risk of the ALJ failing to take proper note of those items.

In addition to the summary, always have the original written material, such as all pertinent time records, available at the hearing. The other side has the right to challenge your summary and to examine the original material from which the summary was compiled.

18. IN QUESTIONING YOUR WITNESS AVOID LEADING QUESTIONS.

A leading question is one which suggests the answer. If you are asking your witness a series of questions, all of which call for a yes or no answer, you are probably asking leading questions. Ordinarily the ALJ will interject and stop you from leading your witness, but is not required to do so. Not only are leading questions objectionable, they detract from the credibility of your witness.

If it is necessary for you to question your witness, it is best to use short questions which can be answered by relating a fact, rather than answering yes or no. Ideally, your questions should call for one key fact at a time. It is also best to ask a series of such questions leading up to the crucial point in the case. When you reach that point, simply ask your witness:

"What happened next?" or something to that effect.

19. DO NOT ATTEMPT TO GET YOUR WITNESS TO CHANGE HIS OR HER TESTIMONY.

Each person has a different way of expressing herself. Even if your witness does not testify exactly as you would have, it is best not to attempt to prod him or her into changing his or her testimony by further questions, unless he or she made an obvious misstatement which can be easily rectified. Otherwise, attempting to induce him or her to change usually causes confusion, and may result in a repetition of the same testimony.

If your witness testified to something you know not to be true, you have a right to impeach your own witness (California Evidence Code Section 785). Do not be confused by the legal term: "impeach." It simply means you may offer evidence contrary to the witness' testimony or tending to show the testimony was incorrect.

20. EXPLAIN TECHNICAL TERMS, OCCUPATIONAL SLANG, AND STRANGE CUSTOMS OF THE TRADE.

Part of your job in presenting your appeal is clearly to define and explain those special terms and customs of your industry or occupation.

21. ON CROSS-EXAMINATION, DO NOT SIMPLY ASK THE OPPOSING WITNESS TO REPEAT TESTIMONY.

The paramount rule of cross-examination is: If you do not know what to ask, do not ask. Merely asking questions which require the adverse witness to repeat his/her testimony, in the hope that something will turn up, generally does you little good and

much harm. At best, you get into an argument with the witness over precisely what his/her previous testimony was. At worst, you highlight the points the witness made against you.

22. ON CROSS-EXAMINATION, RESIST THE TEMPTATION TO RUB IT IN.

Another fundamental rule of cross-examination has been expressed this way: When you strike oil, stop drilling. You have no obligation to produce evidence against yourself or ask questions which may weaken your case. If the adverse witness gave an answer which makes a point in your favor, do not push your luck.

23. RESIST THE URGE TO FIGHT EVERY POINT YOUR OPPONENT MAKES.

As the hearing progresses, keep your eye on the ball. The "ball" is the key issue in the case. Parties are often tempted to oppose every single point the other side is making without regard to the effect on the outcome.

This pitfall is best illustrated by an example: In a case where the claimant allegedly assaulted the supervisor, which the claimant denies, the claimant's representative goes to great lengths to prove that the supervisor was a bad person. This tends to prove that the claimant probably provoked into striking the supervisor.

The employer proceeds to spend the remainder of the hearing attempting to prove the supervisor is a perfect saint and no person could conceivably wish to strike such an individual. It never dawns on the employer that the claimant's evidence is more in the employer's favor and the evidence the employer now offers, in retaliation, only tends to prove there would be no reason for the claimant to strike the supervisor.

Moreover, some points the other side raises may not affect the outcome one way or another.

24. DO NOT ASSUME THE ALJ KNOWS EVERY LAW EVER ENACTED.

We are a society governed by laws, rules, and regulations. No individual is capable of knowing all the laws, or even of knowing of the existence of all of them.

If you are relying on a point of law in the unemployment insurance field, the ALJ most likely knows about it. It is not necessary to cite or point out the law. If your case turns on decision, rule, or regulation in another field, however, you should cite that statue or decision to the ALJ. If you do not have the full text of the law, at least be prepared with an accurate citation which enables the ALJ easily to find it. If you have the rule, regulation, or decision available, it is not a bad idea to submit a Xerox copy. At least you have eliminated the possibility of error in quoting the law.

25. DO NOT RELY SOLELY ON ANOTHER ALJ'S DECISION.

There is an understandable temptation to rely on the fact that another ALJ at some other time made a decision which, it now appears supports your position. To mention that decision does no harm, but it should not be all you have to offer. Your case must stand on its own. In that other case, the facts may have been slightly, but significantly, different, the law may have changed, or the ALJ may have been wrong.

26. DO NOT BASE YOUR APPEAL ENTIRELY ON AN OFF-THE-WALL THEORY

In an unemployment appeal it is unlikely that you will win on some unique theory or novel argument. Your best approach is to stick to a down-to-earth presentation keyed to the essential issues of unemployment eligibility, backed up by solid evidence.

Sometimes claimants conduct is protected by the constitutional rights of free speech. However, free speech does not entitle an employee deliberately to insult the employer's best customer and still collect unemployment benefits.

More than one employer has appeared at the hearing totally unprepared to give evidence on the essential issues and hoping to establish that the unemployment insurance program is contrary to fundamental law and justice, not to mention the constitution. However sympathetic the ALJ may be to the plight of the employer, he does not have jurisdiction to declare the entire unemployment insurance program null and void.

While it is not a novel theory, another misconception commonly held by claimants is that unemployment eligibility is based on financial need. Personal finances may be relevant information in some cases. Ordinarily, however, a claimant can be disqualified for benefits regardless of his financial distress, and must, independent of financial need, establish eligibility in order to collect benefits.

27. WHEN YOU GET STUCK, SAY SOMETHING.

The ALJ is required to protect the rights of both parties and to aid and assist the parties in presenting their cases. There may come a point in the hearing when you are caught by surprise, do not know what to do or say next, or realize you have overlooked or forgotten something. You may be tempted to remain silent to avoid embarrassment. To do so is a mistake.

In reaching a decision, the ALJ is confined to the evidence in the record and, on a further appeal, you will ordinarily not be allowed to offer additional evidence. If you keep silent, the ALJ, or someone reviewing the record, will have no way of knowing there exists other evidence you might have produced or some other point or argument you might have made.

In other words, do not be embarrassed; bring your problem to the attention of the ALJ. If necessary, make a simple request for a continuance of the hearing or for the right to produce further documents. In many cases the ALJ may suggest a way to make your point without having to continue the hearing to another time. If your request is denied, your request is a matter of record. If the ALJ was wrong, it may be grounds for reversal on appeal.

Okay, so you have tried to avoid the pitfalls and you still lost the appeal. You still have one reasonable course of action: File an appeal with the California Unemployment Insurance Appeals Board.

The Appeals Board will review all the evidence and issue a written decision. If the Board believes the ALJ was wrong, the decision will be reversed or modified.

But (one more pitfall) there is a time limit on filing an appeal to the Board (20 days) so do not delay.